Supreme Court, U.S.
FILED

98 939 DEC 8 - 1998

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No. 98-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

DAVID KEENE LEAVITT, ANNE GILMORE CONATY
ELEANOR WOLFE CONATY, THOMAS CONATY,
and
BRIAN P. CONATY,

Petitioners,

v.

JOHN WOODRUFF KESSEL,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Appeals Of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED

To protect the best interests of her unborn child, a pregnant unwed mother from West Virginia went to California to give birth and to place her baby for adoption. Although the biological father repeatedly suggested that this mother should consider having an abortion and provided no support to her during the pregnancy, he was awarded $7,850,000 against the unwed mother, her parents, her brother, and her adoption lawyer, including $5,850,000 in punitive damages, under a theory that they fraudulently had concealed this baby from him. The following questions are presented:

I. Whether this Court's decision in *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983), upon which the West Virginia Supreme Court based this fraudulent concealment claim, stands for the proposition that once a child has been born, the biological father, who provided no support during the pregnancy and who asked the mother to abort the child, has the same rights as the mother, under the Due Process and Equal Protection Clauses, in determining whether the child should be placed for adoption?

II. Whether a party who has perfected his appeal in state court can be dismissed from the appeal, consistent with the Due Process and Equal Protection Clauses, for failing to post an "appeal bond" where the state has no such authority for an "appeal bond," in the absence of a stay of execution or supersedeas, and where the party was financially incapable of posting the $1,100,000 appeal bond?

III. Whether Petitioners' rights under the Due Process Clause were violated when they were held liable for punitive damages for conduct that was legal in the jurisdiction where the actions occurred and where they had no notice that their actions might subject them to punitive damages?

PARTIES INVOLVED AND RULE 29.6 STATEMENT

In addition to the parties listed in the caption, Ray Miller Kessel, the father of Respondent John Woodruff Kessel, also was a party in the courts below. None of the parties in the courts below or in this Court is a corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES INVOLVED AND RULE 29.6 STATEMENT ii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED 2
STATEMENT 3
I. ANNE PLACES BABY FOR ADOPTION 7
II. KESSEL FILES SEVERAL LAWSUITS 8
III. LEAVITT DISMISSED FROM APPEAL AND VERDICT AFFIRMED AGAINST CONATYS 13
REASONS FOR GRANTING THE PETITION 15
I. *LEHR* DOES NOT HOLD THAT UNWED MOTHERS AND FATHERS HAVE EQUAL RIGHTS TO DETERMINE WHETHER TO PLACE THEIR CHILD FOR ADOPTION 18
II. UNAFFORDABLE "APPEAL BOND" IMPOSED WITHOUT LEGAL AUTHORITY VIOLATES DUE PROCESS AND EQUAL PROTECTION CLAUSES 21
III. *BMW* REQUIRES VACATING PUNITIVE DAMAGES 25
CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Adoption of Irby,
226 Cal.App.2d 238, 37 Cal.Rptr. 879 (1964),
overruled on other grounds, In Re Richard M.,
14 Cal.3d 783, 537 P.2d 363 (1975) 4

BMW of North America, Inc. v. Gore,
517 U.S. 559, 116 S.Ct. 1589,
134 L.Ed.2d 809 (1996) 7,18,25-29

Boddie v. Connecticut,
401 U.S. 371, 91 S.Ct. 780,
28 L.Ed.2d 113 (1971) 7,23

Caban v. Mohammed,
441 U.S. 380, 99 S.Ct. 1760,
60 L.Ed.2d 297 (1979) 16,17,19

Cheryl H. v. Superior Court,
41 Cal.App.3d 273, 115 Cal.Rptr. 849 (1974),
overruled on other grounds, In Re Richard M.,
14 Cal.3d 783, 537 P.2d 363 (1975) 4

Circus Circus Hotels, Inc. v. Superior Court,
120 Cal.App.3d 546, 174 Cal.Rptr. 885 (1981) 22

Coleman v. Coleman,
57 Md.App. 755,
471 A.2d 1115, *cert. denied*,
298 Md. 353, 469 A.2d 1274 (1984) 17

Conn v. Conn,
525 N.E.2d 612 (Ind.Ct.App.), *affd & op. below adopted*,
526 N.E.2d 958 (Ind.), *cert. denied*,
488 U.S. 955, 109 S.Ct. 391,
102 L.Ed.2d 380 (1988) 17

Connick v. Suzuki Motor Co.,
174 Ill.2d 482, 675 N.E.2d 584,
221 Ill.Dec. 389 (1996) 6

Darwin v. Ganger,
174 Cal.App.2d 63, 344 P.2d 353 (1959) 4
Davidson v. Rogers,
431 So.2d 483 (Miss. 1983) 6
Doe v. Doe,
365 Mass. 556, 314 N.E.2d 128 (1974) 17
Doe v. Smith,
527 N.E.2d 177 (Ind.1988) 17
Drago v. The Home Insurance Co.,
486 So.2d 940 (La.App.1986) 22
Dunham v. Hunt Midwest Entertainment, Inc.,
2 Neb.App. 969, 520 N.W.2d 216 (1994); 22
Emerald Texas Inc. v. Peel,
920 S.W.2d 398 (Tex.Ct. App. 1996) 6
Erickson v. Spore,
618 F.Supp. 1356 (D.Minn. 1985) 22
Fairmont Foods Co. v. Skelly Oil Co.,
616 S.W.2d 548 (Mo. Ct. App. 1981) 6
First Security Bank v. Banberry Development,
786 P.2d 1326 (Utah, 1990) 6
Gardner v. Braniff International,
312 F.Supp. 844 (D.Conn. 1970) 22
Goellner v. Butler,
836 F.2d 426 (8th Cir. 1988) 6
Griffin v. Illinois,
351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) 23
Guay v. Ozark Airlines,
450 F.Supp. 1106 (D.Mass. 1978) 22
Helicopteros Nacionales de Colombia, S.A. v. Hall,
466 U.S. 408, 104 S.Ct. 1868,
80 L.Ed.2d 404 (1984) 22
In Re: General Motors Corp. Anti-Lock Brake Products Liability Litigation,
966 F.Supp. 1525 (E.D.Mo. 1997) 6

In Re: Temporomandibular Joint (TMJ) Implants Products Liability Litigation v. The Dow Chemical Co.,
113 F.3d 1484 (8th Cir. 1997) 6
Jones v. Helms,
452 U.S. 412, 101 S.Ct. 2434,
69 L.Ed.2d 118 (1981) 12
Jones v. Smith,
278 So.2d 339 (Fla.1973), *cert. denied*,
415 U.S. 958, 94 S.Ct. 1486,
39 L.Ed.2d 573 (1974) 17
Kessel v. Leavitt et al.,
1998 W.Va. LEXIS 1355 1,5,14
Kovich v. Paseo Del Mar Homeowners' Ass'n,
41 Cal.App.4th 863,
48 Cal.Rptr,2d 758 (Cal.Ct.App2dDist. 1996) 6
Landgraf v. USI Film Products,
511 U.S. 244, 114 S.Ct. 1483,
128 L.Ed.2d 229 (1994) 29
Lehr v. Robertson,
463 U.S. 248, 103 S.Ct. 2985,
77 L.Ed.2d 614 (1983) 5,6,14-16,18-21
Lindsey v. Normet,
405 U.S. 56, 92 S.Ct. 862,
31 L.Ed.2d 36 (1972) 23,24
M.L.B. v. S.L.J.,
519 U.S. 102, 117 S.Ct.555,
136 L.Ed.2d 475 (1996) 23
Munley v. District Court,
104 Nev. 492, 761 P.2d 414 (1988) 22
Nicolet, Inc. v. Nutt,
525 A.2d 146 (Del. 1987) 6
Pacific Life Insurance Co. v. Haslip,
499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) ... 26

Planned Parenthood of Central Mo. v. Danforth,
428 U.S. 52, 96 S.Ct. 2831,
49 L.Ed.2d 788 (1976) 17
Planned Parenthood of Southeastern Pa. v. Casey,
505 U.S. 833, 112 S.Ct. 2791,
120 L.Ed.2d 674 (1992) 17
Price and Sons v. District Court,
108 Nev. 387, 831 P.2d 600 (1992) 22
Progressive Casualty Ins. Co. v.
C.A. Reaseguradora Nacional De Venezuela,
991 F.2d 42 (2d Cir. 1993) 6
Przybyla v. Przybyla,
87 Wis.2d 441, 275 N.W.2d 112 (Ct.App.1978) 17
Quilloin v. Walcott,
434 U.S. 246, 98 S.Ct. 549,
54 L.Ed.2d 511 (1978) 19
Remington Rand Corp. v. Amsterdam-Rotterdam Bank, N.V.,
68 F.3d 1478 (2d Cir. 1995) 6
Roadmasters Industries, Inc. v. Columbia Manufacturing
Co., Inc.,
893 F.Supp. 1162 (D.Mass. 1995) 6
Rothenberger v. Doe,
149 N.J.Super. 478, 473 A.2d 57 (Ch.Div.1977) 17
Scheidt v. Young,
389 F.2d 58 (3d Cir. 1968) 22
Sevin v. Kelshaw,
417 Pa.Super. 1, 611 A.2d 1232 (1992) 6
Shapiro v. Thompson,
394 U.S. 618, 89 S.Ct. 1322,
22 L.Ed.2d 600 (1969) 12
Stanley v. Illinois,
405 U.S. 645, 92 S.Ct. 1208,
31 L.Ed.2d 551 (1972) 19

Stevens v. Superior Court,
180 Cal.App.3d 605,
225 Cal. Rptr. 624 (1986) 27,28
TXO Production Corp. v. Alliance Resources Corp.,
509 U.S. 443, 113 S.Ct. 2711,
125 L.Ed.2d 366 (1993) 26
United States v. Guest,
383 U.S. 745, 86 S.Ct. 1170,
16 L.Ed.2d 239 (1966) 12
Van Pelt v. Best Workover, Inc.,
798 S.W.2d 14 (Tex.Ct.App. 1990) 22
Wood Manufacturing Company, Inc. v. Schultz,
613 F.Supp. 878 (W.D.Ark. 1985) 22

STATUTES

28 U.S.C. §1257 2
28 U.S.C. §2403(b) 2

MISCELLANEOUS

Article I, Section 10 of the
United States Constitution 2,25-26,29,30
Fourteenth Amendment to the
United States Constitution 2,30
Restatement (Second) of Torts §§550 and 551 (1977) 6
Rule 6(d) of the Rules of Appellate Procedure of the
West Virginia Supreme Court 2,6
5 Am.Jur.2d Appellate Review §442 (1995) 24
C.Wright & A. Miller, Federal Practice & Procedure
§2905 (1995) 24

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PETITION FOR A WRIT OF CERTIORARI

Petitioners David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas Conaty, and Brian P. Conaty respectfully petition this Court for a writ of certiorari to review final orders of the West Virginia Supreme Court.

OPINIONS BELOW

The decision by the West Virginia Supreme Court in *Kessel v. Leavitt et al.*, is published and reported at 1998 W.Va. LEXIS 135 (1998). App. at 1a. Several orders from the West Virginia Supreme Court are not reported. App. at 232a-35a,

248a-58a. The orders and judgment entered in the Circuit Court of Cabell County, West Virginia are not reported. App. at 236a-44a.

JURISDICTION

The order by the West Virginia Supreme Court denying the Petitioners' rehearing petition was entered September 10, 1998. App. at 234a. The jurisdiction of this Court is invoked under 28 U.S.C. §1257. The Attorney General of West Virginia has been notified of the challenge to the actions of the court below by service of a copy of this petition. *Cf.* 28 U.S.C. §2403(b) and this Court's Rule 29.4(c).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

Section I of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 10 of the United States Constitution provides, in relevant part, "No State shall...pass any...ex post facto Law...."

Rule 6(d) of the Rules of Appellate Procedure of the West Virginia Supreme Court provides:

> In civil cases relief available in the circuit court or the Supreme Court under this rule may be conditioned upon the filing of a bond or other appropriate security in the circuit court, in such amount and upon such conditions as the court granting the stay feels is proper

for the protection of the adverse party. The provisions of W. Va. Code, 58-5-14, are applicable. Such bond shall be filed within thirty days of the granting of the supersedeas with the clerk of the circuit court, who shall immediately report the filing of the same to the Clerk of the Supreme Court. Failure to execute such bond may be grounds for the dismissal of the appeal.

STATEMENT

In January, 1991, Anne Conaty, a thirty-year-old unmarried kindergarten teacher from Huntington, West Virginia, was faced with the same personal dilemma confronting all pregnant women who have decided to give birth--whether to raise the baby herself or to place him for adoption. Anne decided that the interests of her child would be served best by placing him for adoption in the home of a Christian married couple, who were unable to have children.

Anne relied upon the legal advice given by David Leavitt, a very experienced and well qualified adoption lawyer whose practice is in Beverly Hills, California.[1] As Anne's lawyer, Leavitt's duty was to carry out her wishes, to the extent allowable by California law. In particular, Anne sought to place her baby for adoption, without providing any notice to John Kessel, the biological father, whom Anne began to fear and to distrust. Since the law in California at that time gave the mother the absolute right to place her child for adoption, without notice to or the consent of the biological father, Leavitt advised Anne on how the placement could be accomplished

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[1]Leavitt's law practice has been devoted exclusively to performing adoptions for over thirty-five years. At the time of trial, Leavitt had handled over 9,000 adoptions. (Tr. 10).

legally and consistent with her wishes.[2] Thus, Anne placed Baby Boy Conaty for adoption in full compliance with California law and the actual adoption in Alberta, Canada, which was not handled by Leavitt, was completed in accordance with the laws of that country.

Throughout the pregnancy and thereafter, Kessel relentlessly pursued Anne, her parents, Thomas J. and Eleanor Conaty, her brother, Brian P. Conaty, and her lawyer, David Leavitt, in an effort to prevent Anne from placing her child for adoption. Kessel litigated issues related to this child in California, West Virginia, and in Alberta, Canada. In addition to this litigation, all of which was unsuccessful, except for the present case, Kessel verbally harassed Anne, suggested several times that she have an abortion, had a physical altercation with Thomas and Brian, and never offered one cent of support during the pregnancy.

Nevertheless, in an action that is unprecedented not only in West Virginia but in the history of this country, Anne's personal decision to have her baby placed for adoption was transformed into a multi-million dollar civil action by Kessel

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[2]*See Darwin v. Ganger*, 174 Cal.App.2d 63, 344 P.2d 353 (1959); *Cheryl H. v. Superior Court*, 41 Cal.App.3d 273, 115 Cal.Rptr. 849 (1974), *overruled on other grounds, In Re Richard M.*, 14 Cal.3d 783, 537 P.2d 363 (1975); *Adoption of Irby*, 226 Cal.App.2d 238, 37 Cal.Rptr. 879 (1964), *overruled on other grounds, In Re Richard M.*, 14 Cal.3d 783, 537 P.2d 363 (1975). Consistent with this case law, the jury was instructed that Anne had a constitutional right to travel to any jurisdiction to have her child (Defendants' Instruction No. 1); that Anne had **no duty** to tell Kessel of her whereabouts, the progress of the pregnancy or any information concerning the birth of the child (Defendants' Instruction No. 2); that Anne had the right to place her child for adoption, **without Kessel's permission**, and that she **was not obligated to notify Kessel of this placement** (Defendants' Instruction Nos. 5 & 6); and that no persons other than the adoptive couple had any duty to notify Kessel that the child was being transported from California to Canada for adoption (Defendants' Instruction No. 12).

against Anne, Thomas, Eleanor, Brian, and Leavitt. His fraudulent concealment claim was premised upon a misinterpretation of this Court's decision in *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983). The end result was a verdict returned by a jury in the Circuit Court of Cabell County, West Virginia for Kessel against Petitioners of $7,850,000, including $5,850,000 in punitive damages.

After Petitioners appealed this verdict to the West Virginia Supreme Court and the case was accepted and argued, Leavitt was dismissed from the appeal on March 20, 1997, for failing to post an "appeal bond" of $1,100,000, which he financially could not afford. App. at 258a. Leavitt was the only defendant who was a nonresident of West Virginia and was the only defendant required to post this "appeal bond." Furthermore, this case marks the first time that such an "appeal bond" was required by any appellant in West Virginia and there is no legal authority for such a bond. Nevertheless, after being dismissed, Leavitt filed a petition for writ of certiorari with this Court, which was denied October 6, 1997. App. at 259a. However, at the time his petition was before this Court, the West Virginia Supreme Court had not issued its final decision in the underlying appeal.

On July 22, 1998, the West Virginia Supreme Court issued its decision in *Kessel v. Leavitt, et al.*, 1998 W. Va. LEXIS 135, affirming the verdict on the fraudulent concealment theory and explaining the legal basis for dismissing Leavitt.[3] App. at 1a.

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[3]The jury also held that the Petitioners had tortiously interfered with Kessel's parental rights, even though he never had custody or any other relationship with Baby Boy Conaty, other than a biological connection. While recognizing this cause of action for the first time in any jurisdiction under these facts, the West Virginia Supreme Court only affirmed the judgment against the four Conatys on the fraudulent concealment theory. As to Leavitt, the judgment against him was affirmed based upon the dismissal of his appeal.

In affirming the verdict, the West Virginia Supreme Court acknowledged that it was unable to find any case in any jurisdiction where a similar fraudulent concealment claim had been maintained under these facts.[4] However, the rationale for recognizing this claim was premised upon the West Virginia Supreme Court's misinterpretation of this Court's decision in *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983), which issue had been fully briefed by the parties. Furthermore, the decision explained the dismissal of Leavitt, which he argued violated his due process and equal protection rights, by misquoting Rule 6(d) of the Rules of Appellate Procedure of the West Virginia Supreme Court. Finally, the

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[4]All of the cases on point require an underlying duty to disclose some pertinent fact before a fraudulent concealment claim can be maintained and these cases are limited to business transactions. *Goellner v. Butler*, 836 F.2d 426, 430 (8th Cir. 1988); *Roadmasters Industries, Inc. v. Columbia Manufacturing Co., Inc.*, 893 F.Supp. 1162, 1179 (D. Mass. 1995); *First Security Bank v. Banberry Development*, 786 P.2d 1326, 1328 (Utah 1990); *Sevin v. Kelshaw*, 417 Pa.Super. 1, 8, 611 A.2d 1232, 1236 (1992); *In re: Temporomandibular Joint (TMJ) Implants Products Liability Litigation v. The Dow Chemical Co.*, 113 F.3d 1484, 1497 (8th Cir. 1997); *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149 (Del. 1987); *Remington Rand Corp. v. Amsterdam-Rotterdam Bank, N.V.*, 68 F.3d 1478, 1483 (2d Cir. 1995); *Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 47 (2d Cir. 1993); *In Re General Motors Corp. Anti-Lock Brake Products Liability Litigation*, 966 F.Supp. 1525, 1535 (E.D.Mo. 1997); *Emerald Texas Inc. v. Peel*, 920 S.W.2d 398, 403 (Tex. Ct. App. 1996); *Kovich v. Paseo Del Mar Homeowners' Ass'n*, 41 Cal.App.4th 863, 48 Cal.Rptr.2d 758, 760 (Cal.Ct.App2dDist. 1996); *Davidson v. Rogers*, 431 So.2d 483, 485 (Miss. 1983); *Fairmont Foods Co. v. Skelly Oil Co.*, 616 S.W.2d 548, 550 (Mo. Ct. App. 1981); *Connick v. Suzuki Motor Co.*, 174 Ill.2d 482, 675 N.E.2d 584, 221 Ill.Dec. 389 (1996); Restatement (Second) of Torts §§ 550 and 551 (1977). The West Virginia Supreme Court ignored the requirement of an underlying duty to disclose and compounded this fundamental error by misquoting Restatement (Second) of Torts §550, which limits this claim to transactions, usually business transactions. App. at 50a.

punitive damages awarded were upheld, despite the arguments presented that the damages did not comply with this Court's holdings in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).

I. ANNE PLACES BABY FOR ADOPTION

In November, 1990, when Anne informed Kessel, with whom she had maintained a relationship for about seven years, that she was pregnant, Kessel initially offered to marry her. However, through further discussions, Anne learned that Kessel had been in an ongoing relationship with another woman and the engagement was canceled. (Tr. 2022, 2025, 2032). In their discussions over the pregnancy, Kessel suggested to Anne at least seven different times that she should consider an abortion. (Tr. 2019, 2027, 2029). However, due to her religious beliefs, an abortion was never an option for Anne. (Tr. 2026).

Anne and Kessel had a number of confrontations over the fate of this unborn child. On one occasion, Kessel harassed Anne at her elementary school, which resulted in him being forcibly removed by the janitor. (Tr. 2038). Near the end of January, 1991, Kessel engaged in a physical altercation with Dr. Thomas J. Conaty, Anne's father, and Brian P. Conaty, Anne's brother. (Tr. 2038, 1138, 2040). Through these incidents, Anne became very fearful of Kessel and decided that she had to leave West Virginia to protect her child and for her own safety. The day after the incident with her father and brother, Anne left West Virginia, still undecided as to whether she would raise the baby herself or place him for adoption. (Tr. 1138, 2040).

Once Anne decided that adoption would be in her child's best interests, she eventually was referred to David Leavitt. During one of their initial telephone calls, Anne was informed either by Leavitt or his wife that the placement for adoption

could be accomplished under California law without the signature of the biological father. (Tr. 51). During the final months of her pregnancy, Anne went to California, accompanied by her mother, Eleanor. (Tr. 1585, 2064). To the best of her knowledge, her father and mother were the only members of her family who knew she was staying in California. (Tr. 2065).

On July 24, 1991, Anne checked into Cedars-Sinai Hospital in Los Angeles, California, under an assumed name because she wanted her privacy and feared Kessel. (Tr. 2067). On that date, she gave birth to a healthy baby boy. Eleanor and Thomas were present in the delivery room. The adoptive parents, who were from Alberta, Canada, also were in the hospital at the time of birth.

On July 25, 1991, the day after the baby was born, Anne signed various documents which allowed the adoptive couple to take Baby Boy Conaty and assume legal guardianship of him. (Tr. 1589). When Anne signed the papers on July 25, 1991, after meeting with the adoptive couple for about an hour, the names of the adoptive couple were on the forms and available to her for her review. (Tr. 1593, 2070, 245). However, she deliberately made an effort not to see their names or the sex of the baby. (Tr. 1590).

II. KESSEL FILES SEVERAL LAWSUITS

On June 3, 1991, Kessel filed an inverse paternity action against Anne in the Circuit Court of Cabell County, West Virginia, seeking a declaration that he was the father of the unborn child and a determination of his rights and obligations to the child. (Plaintiff's Exhibit 10). On June 26, 1991, at a time when Anne was traveling around the country trying to decide what to do, Kessel obtained an *ex parte* temporary injunction order, enjoining Anne from placing her unborn child

for adoption. (Plaintiff's Exhibit 17). Both the complaint and the order were served on Anne through publication, effective July 26, 1991, **after** the placement for adoption already had occurred. (Plaintiff's Exhibit 49). Anne did not have actual knowledge of the *ex parte* temporary injunction order until November 10, 1991, while Leavitt learned of this order on August 6, 1991. (Tr. 1600-04, 1299, 1310, 1013). The only Petitioner who had knowledge of this order **prior** to the birth of the child was Brian, but he never informed Leavitt or any member of his family about this order. (Tr. 2898).

On October 17, 1991, Kessel filed an action in the Superior Court of the State of California for the County of Los Angeles, in an attempt to depose Leavitt and Anne's physician to develop evidence for the West Virginia inverse paternity action. However, Leavitt and the physician asserted their respective privileges at their depositions. After the matter was briefed and argued, the California trial court upheld the assertion of these privileges in a notice of ruling issued January 2, 1992. This ruling was the final action taken in this case. (Tr. 158).

On or about November 26, 1991, Kessel filed a civil action against Anne, Leavitt, and others, seeking damages for conspiracy, fraud, intentional infliction of emotional distress, negligent infliction of emotional distress, and child abduction. Pursuant to California law, a demurrer was filed on behalf of the named defendants, arguing that Kessel had failed to state a cause of action. On or about January 3, 1992, counsel for Kessel filed a request for dismissal, which was the final action taken in this particular case. (Tr. 828).

On or about January 15, 1992, Kessel learned the identity of the adoptive couple and their location. (Tr. 761, 1649, Defendants' Exhibit 2). On March 3, 1992, Kessel filed a statement of claim and a paternity action in the Court of Queen's Bench of Alberta, Canada, Judicial District of Calgary. After being advised by his counsel that he had no chance of

prevailing under the facts and the applicable Canadian law, Kessel chose not to pursue the Canadian litigation any further. (Tr. 769-70, 1651).

On June 22, 1992, an order was entered in the Canadian action dismissing all of the claims filed by Kessel, dispensing with his consent, and granting the petition for adoption. On August 26, 1991, an order was entered by the Canadian court approving the adoptive couple as the sole guardians of Baby Boy Conaty and terminating the guardianship and custody rights of Anne. (Plaintiff's Exhibit 103).

Having failed to nullify the adoption, Kessel filed, on July 22, 1992, the present action in the Circuit Court of Cabell County, West Virginia. One of the main issues at trial was when did each of the Petitioners know the identity of the adoptive couple, their location, and the existence of the *ex parte* temporary injunction order. The record contains evidence of **only one conversation** between Kessel and any of the Petitioners after the birth of the child. That conversation occurred when Kessel telephoned Leavitt near the end of July, 1991, after seeing Leavitt's yellow pages advertisement.[5] Leavitt was required to assert the attorney-client privilege at that time and was unable to answer any of Kessel's questions. (Tr. 1012, 1643-44).

Other than that conversation, the only other occasions when any of the Petitioners were asked questions by Kessel or his counsel was when they were deposed. In August, 1991, when Eleanor, Thomas, and Brian were deposed, they did not know the names of the adoptive couple, their whereabouts, the

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[5]Leavitt had a yellow pages listing in the Huntington, West Virginia telephone book for that one year. (Tr. 52-53). Anne's initial contact with Leavitt was not based upon this yellow pages listing, but rather was based upon a referral from another California lawyer, whose telephone number was listed in USA Today. (Tr. 1869-70, 2045, 50).

location of the baby, or the location of Anne. (Tr. 716, 1011, 1093, 1893; Plaintiff's Exhibit 73). Similarly, when Anne was deposed in November, 1991, she was not able to provide Kessel with any information regarding the identity of the adoptive couple or their whereabouts because she chose not to learn that information when she placed her child for adoption. (Tr. 1589-91).

When Leavitt, who was the only Petitioner who knew the adoptive couple and their location, was deposed in California in November, 1991, he was required to assert the attorney-client privilege, which assertion was upheld by the California trial court. Other than this one telephone call and these depositions, the Petitioners never had any occasion to respond to any inquiries from Kessel about Baby Boy Conaty following his birth.

From the opinion, it is difficult to identify what actions by the Petitioners support this multi-million dollar verdict. At this time, the Petitioners still do not know what they did to justify the financial destruction inflicted upon them in this case.

During the trial, the evidence demonstrated that the "worst" thing Thomas and Eleanor did was failing to appear at their first deposition, based upon a misunderstanding on their part, which resulted in them being cited for contempt. However, when they were deposed a few weeks later, purging themselves of contempt, neither Thomas nor Eleanor had the information sought by Kessel, namely the identity of the adoptive couple and their location. (Tr. 1011, 1093, 1893, 716; Plaintiff's Exhibit 73).

On January 27, 1992, Anne was found in contempt of court for refusing to authorize the release of her medical records, which the California trial court had held were subject to the physician-patient privilege. (Plaintiff's Exhibits 76 and 78). Although Kessel emphasized this fact in presenting his case and the West Virginia Supreme Court relied heavily on it, it is

undisputed by Kessel that by January 15, 1992, he knew the identity of the adoptive couple and their location. (Defendants' Exhibit 2). App. at 17a-18a, 124a-25a.. The short delay in obtaining her medical records had no impact on Kessel's quest to locate the adoptive couple because he already had that information. Furthermore, the medical records did not contain the information Kessel sought. Other than this insignificant medical records incident, Anne was "guilty" of exercising her constitutional right to travel[6] and abiding by the law in California with respect to the placement of her child for adoption.

Brian's involvement in this case was very minimal. He chose not to learn certain information regarding the birth of Baby Boy Conaty and the identity of the adoptive couple so that he would not be have that information when deposed by Kessel. Thus, the only thing Brian did was testify truthfully in his deposition and at trial that he did not have actual knowledge of the information Kessel was trying to develop.

Leavitt correctly advised Anne of California law and he made sure that the placement of Baby Boy Conaty was proper legally. Other than providing correct legal advice, Leavitt did assert the attorney-client privilege when he was deposed in California in November, 1991, which privilege he was required to assert and which was upheld by the California trial court. Even though Kessel may not have liked the fact that Anne was placing her child for adoption, without notifying him, Anne had the right to make that placement, and Leavitt had the right to

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[6]*Jones v. Helms*, 452 U.S. 412, 418, 101 S.Ct. 2434, 2439, 69 L.Ed.2d 118, ___ (1981); *Shapiro v. Thompson*, 394 U.S. 618, 629-31, 89 S.Ct. 1322, 1328-29, 22 L.Ed.2d 600, ___ (1969); *United States v. Guest*, 383 U.S. 745, 757-59, 86 S.Ct. 1170, 1177-78, 16 L.Ed.2d 239, ___ (1966)

give Anne the proper legal advice to ensure that the placement complied with California law.

III. LEAVITT DISMISSED FROM APPEAL AND VERDICT AFFIRMED AGAINST CONATYS

The judgment was entered against the Petitioners on December 7, 1995. App. at 236a. The Petitioners filed several post-trial motions in an effort to have the judgment set aside, but these motions were denied by the trial court. App. at 240a-43a. The Conatys, all of whom were residents of Huntington, West Virginia, moved for a stay of execution on the judgment. The trial court granted this motion, based upon the Conatys' disclosure of their assets and agreement not to dispose of any of their assets pending the appeal. App. at 244a. As for Leavitt, he chose not to stay execution of the judgment against him, thereby freeing Kessel to attempt execution while the appeal was pending. Petitioners' filed a joint petition for appeal with the West Virginia Supreme Court, which was granted on June 26, 1996. App. at 248a.

While the appeal in West Virginia was pending, Kessel proceeded to sue Leavitt and members of his family in California in executing on the judgment. In January, 1997, prior to the West Virginia appeal being argued, Kessel asked the West Virginia Supreme Court to require Leavitt to post an "appeal bond" of $7,000,000, because a California trial court refused to allow execution on the judgment due to West Virginia's lack of personal jurisdiction over Leavitt. This motion was granted, stayed, and ultimately modified, requiring Leavitt to post an appeal bond in the amount of $1,100,000. App. at 250a-54a. Leavitt moved for a reconsideration of this order, arguing not only that there was no legal authority for such a requirement, but that financially he could not post such a high bond, particularly since all of his assets were levied upon

by Kessel already. However, this motion was denied and Leavitt, who could not post the $1,100,000 "appeal bond," was dismissed from the appeal on March 20, 1997, a few months after the case had been argued and the parties were waiting for a decision. App. at 256a-58a.

In the *Kessel v. Leavitt, et al.* decision issued on July 22, 1998, the West Virginia Supreme Court began its legal discussion by addressing the dismissal of Leavitt. After reviewing the West Virginia statutes on supersedeas or stay bonds and its own Rule 6(d), which is limited to stay or supersedeas bonds, the West Virginia Supreme Court concluded that it had acted properly in imposing an "appeal bond" that Leavitt financially could not afford and for which there was no legal authority. App. at 24a-26a. The fact that Leavitt had chosen not to stay execution on the judgment pending appeal is ignored by the West Virginia Supreme Court. Consistent with the unpublished orders issued on this point, the West Virginia Supreme Court provided no legal authority supporting the imposition of such an "appeal bond" under similar facts and failed to address specifically the federal constitutional issues raised by Leavitt in the briefs on this point.

The fraudulent concealment claim against the Petitioners was upheld under a theory that they somehow had prevented Kessel from developing a relationship with Baby Boy Conaty. The West Virginia Supreme Court acknowledged that "not only is this asserted cause of action novel to the jurisprudence of this State, but it appears that the courts of no other states have addressed directly whether such a claim may be maintained." App. at 55a. The West Virginia Supreme Court found that this Court's analysis of an unwed father's due process and equal protection rights in *Lehr* required the development of a new tort to render private persons liable for interfering with those rights. The critical conclusion reached by the West Virginia Supreme Court, based upon its interpretation of *Lehr*, is summarized in

Syllabus Point 4:

> The instant a child is born, both unwed biological parents have a right to establish a parent-child relationship with their child. To preserve his parental interest vis-a-vis his newborn child, an unwed biological father must, upon learning of the existence of his child, demonstrate his commitment to assume the responsibilities of parenthood by coming forward to participate in the care, rearing, and support of his newborn child and by commencing to establish a meaningful parent-child relationship with his child.

The Conatys filed a timely petition for rehearing, noting all of the factual and legal errors contained in the decision.[7] On September 10, 1998, the West Virginia Supreme Court denied the rehearing petition, from which the Petitioners now seek relief from this Court.

REASONS FOR GRANTING THE PETITION

This case presents the Court with three significant issues of national importance. The first issue, involving the West Virginia Supreme Court's misapplication of this Court's

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[7]Even though the West Virginia Supreme Court found at least ten substantive instructions to have been erroneously given or erroneously refused, all of these errors were found to be harmless. The Petitioners' arguments on the lack of any evidence to support any of the claims were misstated by the West Virginia Supreme Court as seeking an appeal of the trial court's denial of their motion to dismiss. Thus, after issuing an opinion that exceeded two hundred pages in the slip opinion format, the West Virginia Supreme Court failed to identify what possible evidence supported this unjustified runaway verdict where the Petitioners were "guilty" of complying with California law with respect to the adoption placement and "guilty" of keeping themselves ignorant of certain facts so they could truthfully answer any questions posed by Kessel.

decision in *Lehr*, gives any biological father, even one who has not grasped his opportunity to be a parent, a powerful weapon to be used against a woman impregnated by him. Under the West Virginia Supreme Court's analysis, such a biological father can use the threat of a multi-million dollar lawsuit against a woman he has impregnated if she decides, against his wishes, that it is in the child's best interests to be placed for adoption. This Court has never held that an unwed father has the same rights as the unwed mother in determining whether to place their child for adoption.[8] This issue is particularly

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[8]In *Caban v. Mohammed*, 441 U.S. 380, 406-07, 99 S.Ct. 1760, 1775, 60 L.Ed.2d 297, ___ (1979), Justice Stevens discussed the issue that is at the heart of the present case, namely, whether a mother and father of a newborn infant have equal rights in determining whether the child should be placed for adoption:

> In short, it is virtually inevitable that from conception through infancy the mother will constantly be faced with decisions about how best to care for the child, whereas it is much less certain that the father will be confronted with comparable problems. There no doubt are cases in which the relationship of the parties at birth makes it appropriate for the State to give the father a voice of some sort in the adoption decision. But as a matter of equal protection analysis, it is perfectly obvious that at the time and immediately after a child is born out of wedlock, differences between men and women justify some differential treatment of the mother and father in the adoption process.
>
> **Most particularly, these differences justify a rule that gives the mother of the newborn infant the exclusive right to consent to its adoption. Such a rule gives the mother, in whose sole charge the infant is often placed anyway, the maximum flexibility in deciding how best to care for the child. . . .** Finally, it facilitates the interests of the adoptive parents, the child, and the public at large by streamlining the often traumatic adoption process and allowing the prompt,

troubling under the facts of this case, where there is no dispute that California law recognized the exclusive right of the mother to place her child for adoption.

The reproductive rights of pregnant women to seek abortions without interference from the putative father is well established.[9] This case raises the issue of whether women have the right to place their children for adoption, without interference from the unwed father. Pregnant women faced with the choice of abortion or adoption may be more inclined to choose the former, due to the uncertainties created by the latter, under the West Virginia Supreme Court's ruling. Other women may choose to keep their pregnancies secret from the putative fathers, or may be so afraid to risk placing the baby for

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> complete, reliable integration of the child into a satisfactory new home at as young an age as is feasible. Put most simply, it permits the maximum participation of interested natural parents without so burdening the adoption process that its attractiveness to potential adoptive parents is destroyed. (Emphasis added). (Footnotes omitted).

[9]Courts routinely have rejected civil claims filed by putative fathers who claim to have suffered damages where a woman has obtained an abortion. *See generally Conn v. Conn*, 525 N.E.2d 612 (Ind.Ct.App.), *affd & op. below adopted*, 526 N.E.2d 958 (Ind.), *cert. denied*, 488 U.S. 955, 109 S.Ct. 391, 102 L.Ed.2d 380 (1988); *Coleman v. Coleman*, 57 Md.App. 755, 471 A.2d 1115, *cert. denied*, 298 Md. 353, 469 A.2d 1274 (1984); *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128 (1974); *Doe v. Smith*, 527 N.E.2d 177 (Ind.1988); *Rothenberger v. Doe*, 149 N.J.Super. 478, 374 A.2d 57 (Ch.Div.1977); *Jones v. Smith*, 278 So.2d 339 (Fla.1973), *cert. denied*, 415 U.S. 958, 94 S.Ct. 1486, 39 L.Ed.2d 573 (1974); *see also Przybyla v. Przybyla*, 87 Wis.2d 441, 275 N.W.2d 112 (Ct.App.1978); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 69, 96 S.Ct. 2831, 2841, 49 L.Ed.2d 788 (1976); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S.833, ___, 112 S.Ct. 2791, 2826-2831, 120 L.Ed.2d 674 (1992).

adoption in light of the multi-million dollar verdict affirmed in this case that they attempt to raise the child personally, when under the circumstances, the child's best interests may be better served by adoption.

The second issue, involving the right of a party to appeal a judgment in state court, raises a fundamental issue of whether a state court can, consistent with due process and equal protection principles, create a financial requirement, without any legal authority, that renders it impossible for a party to remain in the appeal. This Court in a variety of circumstances has found the imposition of certain fees or costs levied in order to pursue an appeal to violate the federal constitutional rights of those persons who cannot afford such fees or costs.

The third issue, involving the imposition of punitive damages where there was no notice that such conduct could trigger such damages and where the conduct was legal, most recently was addressed by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). This issue arises in any case where some of the critical actions being challenged occurred in another jurisdiction. Thus, in the present case, West Virginia is attempting to hold the Petitioners liable for punitive damages for an adoption placement that was accomplished in accordance with the law in California. The Petitioners respectfully submit that all three issues merit the granting of this **PETITION** and a final resolution by this Court.

I. *LEHR* DOES NOT HOLD THAT UNWED MOTHERS AND FATHERS HAVE EQUAL RIGHTS TO DETERMINE WHETHER TO PLACE THEIR CHILD FOR ADOPTION

In examining the validity of Kessel's fraudulent concealment claim, the West Virginia Supreme Court stated,

"Prior to reaching the precise issue of whether John adequately stated a valid cause of action for fraud, we must first examine the rudimentary foundation upon which John rests his claim." App. at 34a. The West Virginia Supreme Court then asserts that Anne's decision to place her child for adoption was "squarely within her constitutionally protected decisional rights," but affirms Kessel's judgment against Anne for exercising such rights. App. At 35a. From that premise, the West Virginia Supreme Court engages in an extensive discussion of this Court's decisions addressing the due process and equal protection rights of an unwed father. App. at 34a-47a. Although the West Virginia Supreme Court concedes and agrees with the Petitioners that they are not state actors and, therefore, it was error for the jury to be instructed that they had violated Kessel's due process and equal protection rights, for some reason this part of the decision is forgotten when *Lehr* and related cases are discussed.[10] App. at 169a-72a.

In the line of cases involving unwed fathers decided by this Court, concluding with the *Lehr* decision, the issue presented was whether the state adoption statute or procedure violated the unwed father's due process and equal protection rights under the Fourteenth Amendment by failing to provide notice of an adoption. All of these cases concluded, as summarized in *Lehr*, 463 U.S. at 263, 103 S.Ct. at 2993-94, 77 L.Ed.2d at ___, that where an unwed father "grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best

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[10] *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978); *Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979).

interest is." Thus, the *Lehr* line of cases only addresses the due process and equal protection rights of an unwed father who has demonstrated, through his actions, that he wants to assume the responsibilities of being a parent.

This Court has never held that an unwed father's due process and equal protection right to notice of an adoption somehow creates civil liability for private persons who seek to place a child for adoption, without notifying or obtaining the consent of the biological father. Furthermore, this Court has never held that the unwed father's right to notice of an adoption somehow prevents the mother from placing her baby for adoption, without notice to the unwed father, and then having the adoption completed in a jurisdiction outside of the United States, which does not require notice to an unwed father.

The critical point decided by the West Virginia Supreme Court, that unwed mothers and fathers have the same right to establish a relationship with the child the "instant a child is born," has never been determined by this Court. Thus, the West Virginia Supreme Court expanded this Court's holdings in *Lehr* far beyond the actual conclusions reached in that case.

Even if *Lehr* actually applied to these facts, how did Kessel demonstrate his willingness and intent to grasp his opportunity to be a parent? Did Kessel "grasp his opportunity" when he asked Anne on several occasions that she should have an abortion? (Tr. 2019, 2027, 2029). Or when Kessel physically "grasped" Anne's arm at the school and was asked to leave by the school's janitor and principal? (Tr. 2038). Or when Kessel harassed Anne on several occasions and told a number of people in town about her pregnancy? (Tr. 1288). Or when Kessel had a physical altercation with Brian and Thomas? (Tr. 1138, 2040). Or when Kessel filed several unsuccessful lawsuits in California and in Canada, which cases either were summarily dismissed or were dropped by him?

Thus, the West Virginia Supreme Court has misinterpreted *Lehr* and related cases to create a fraudulent concealment action never before recognized in any jurisdiction under similar facts. According to the West Virginia Supreme Court's interpretation of *Lehr*, the Petitioners are liable to Kessel based upon his alleged federal constitutional rights, despite the fact that the Petitioners are not State actors and, therefore, cannot be held liable for violating Kessel's due process or equal protection rights. Moreover, the Petitioners' alleged liability under *Lehr* ignores the fact that the court in Alberta, Canada, where the adoption was finalized, was not bound by decisions from this Court.

The Petitioners respectfully submit that the West Virginia Supreme Court's misinterpretation of *Lehr*, upon which this unprecedented fraudulent concealment claim was based, must be corrected to ensure that the fundamental right of a mother to place her child for adoption, particularly when the jurisdiction where the placement occurs explicitly recognizes that right, is not chilled or abridged by the threat of a civil action from the biological father.

II. UNAFFORDABLE "APPEAL BOND" IMPOSED WITHOUT LEGAL AUTHORITY VIOLATES DUE PROCESS AND EQUAL PROTECTION CLAUSES

When Leavitt was dismissed from the appeal on March 20, 1997, the West Virginia Supreme Court had before it a copy of a declaration filed by Leavitt in California, disclosing his assets, and copies of the documents filed by Kessel in California placing liens on Leavitt's assets. Furthermore, Leavitt repeatedly had argued that his dismissal for failing to post an appeal bond he could not afford financially violated his due process and equal protection rights. Despite the facts

presented and the legal arguments made, the West Virginia Supreme Court dismissed Leavitt's appeal, effectively affirming a $7,000,000 judgment against him, without giving him the benefit of having his significant appellate issues addressed.[11]

The application of due process and equal protection principles to a person's right to appeal has been considered by this Court in a number of decisions. With respect to the right to appeal a lower court's rulings, this Court has recognized the following two general rules:

> "[I]f a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review,

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[11]Since Leavitt had never been to West Virginia prior to this litigation and his only prior contact with that state was the one time yellow pages advertisement in the Huntington, West Virginia telephone book, Leavitt had a very compelling argument that there was no personal jurisdiction over him. Most courts have found the placement of an advertisement in the yellow pages, a newspaper, or other periodical or the maintenance of a toll-free telephone number to be insufficient to establish general jurisdiction over the nonresident defendant. *Van Pelt v. Best Workover, Inc.*, 798 S.W.2d 14, 17 (Tex.Ct.App. 1990); *Dunham v. Hunt Midwest Entertainment, Inc.*, 2 Neb.App. 969, 520 N.W.2d 216 (1994); *Circus Circus Hotels, Inc. v. Superior Court*, 120 Cal.App.3d 546, 174 Cal.Rptr. 885 (1981); *Drago v. The Home Insurance Co.*, 486 So.2d 940 (La.App.1986); *Erickson v. Spore*, 618 F.Supp. 1356 (D.Minn. 1985); *Munley v. District Court*, 104 Nev. 492, 761 P.2d 414 (1988); *Wood Manufacturing Company, Inc. v. Schultz*, 613 F.Supp. 878 (W.D.Ark. 1985); *Price and Sons v. District Court*, 108 Nev. 387, 831 P.2d 600 (1992); *Guay v. Ozark Airlines*, 450 F.Supp. 1106 (D.Mass. 1978); *Gardner v. Braniff International*, 312 F.Supp. 844 (D.Conn. 1970); *Scheidt v. Young*, 389 F.2d 58 (3d Cir. 1968). Leavitt particularly relied upon this Court's decision in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984), because the Conatys' contact with him was not related in any way to this one-time publication of an advertisement in the Huntington, West Virginia yellow pages.

> *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956); *District of Columbia v. Clawans*, 300 U.S. 617, 627, 57 S.Ct. 660, 663, 81 L.Ed. 843 (1937); *Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U.S. 74, 80, 50 S.Ct. 228, 230, 74 L.Ed. 710 (1930); *Reetz v. Michigan*, 188 U.S. 505, 508, 23 S.Ct. 390, 392, 47 L.Ed. 563 (1903); *McKane v. Durston*, 153 U.S. 684, 687--688, 14 S.Ct. 913, 914--915, 38 L.Ed. 867 (1894), and the continuing validity of these cases is not at issue here. When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. *Griffin v. Illinois*, *supra*; *Smith v. Bennett*, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961); *Lane v. Brown*, 372 U.S. 477, 83 S.Ct. 788, 9 L.Ed.2d 892 (1963); *Long v. District Court of Iowa*, 385 U.S. 192, 87 S.Ct. 362, 17 L.Ed.2d 290 (1966); *Gardner v. California*, 393 U.S. 367, 89 S.Ct. 580, 21 L.Ed.2d 601 (1969). *Cf. Coppedge v. United States*, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962); *Ellis v. United States*, 356 U.S. 674, 78 S.Ct. 974, 2 L.Ed.2d 1060 (1958)."

Lindsey v. Normet, 405 U.S. 56, 77, 92 S.Ct. 862, 876, 31 L.Ed.2d 36, __ (1972); *see also Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971)(Indigents denied due process where could not afford fee required for filing divorce).

Most recently, this Court was presented with the issue of whether it was constitutional for a state to require a parent appealing the termination of parental rights to pay for the transcript before the appeal could be pursued. *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S.Ct.555, 136 L.Ed.2d 473 (1996). In *M.L.B.*, this Court, consistent with the *Griffin* and *Boddie* line

of cases, held that where a fundamental right is at stake such as marriage or parental rights, due process and equal protection principles mandate that access to courts cannot be denied based upon a person's inability to pay a fee. In its analysis of this issue, the Court reviewed a number of its decisions in this area, not all of which were restricted to the rights of indigents.

For example, in *Lindsey*, this Court examined an Oregon law requiring an evicted tenant to post a double bond to pursue an appeal. In finding this requirement to be unconstitutional, this Court noted that it impacted indigent and nonindigent appellants, was arbitrary and irrational, and violated equal protection principles.

The general principles developed in these cases can be applied to a requirement that a nonresident appellant post a multi-million dollar appeal bond two weeks before oral argument, where the judgment has not been stayed pending appeal and the nonresident appellant has been subjected to litigation in connection with these collection efforts. It should be noted that Leavitt was under no obligation to post a bond to stay execution of the judgment against him. A party is not required to obtain a stay of judgment or file a supersedeas bond in order to prosecute or take an appeal. 5 Am.Jur.2d Appellate Review §442 (1995); C. Wright & A. Miller, Federal Practice & Procedure §2905 (1995).

This case is perfectly illustrates the due process and equal protection concerns this Court has recognized in reviewing appellate procedures in state courts. The Conatys, who are residents of West Virginia, were not required to post an "appeal bond" similar to the one imposed on Leavitt, a resident of California. If the West Virginia Supreme Court had imposed the same requirement on the Conatys, they similarly would have been unable financially to pursue their appeal. Thus, this Court is presented with a situation where defendants, who have been found jointly and severally liable for substantial monetary

damages, were treated differently by the West Virginia Supreme Court with respect to their right to appeal.

Due process requires that once a state has created a right of appeal, it must offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal. The Conatys were given their fair opportunity to appeal the judgment rendered against them, while Leavitt was unconstitutionally denied this same right. The Petitioners respectfully submit that the ruling by the West Virginia Supreme Court dismissing Leavitt was a clear violation of his due process and equal protection rights, justifying a reversal of that action by this Court.

III. *BMW* REQUIRES VACATING PUNITIVE DAMAGES

The West Virginia Supreme Court affirmed the punitive damages awarded, despite this Court's holdings in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). The punitive damages awarded against the Petitioners, whose actions did not warrant such damages, far exceed their financial net worths, particularly when combined with the $2,000,000 compensatory damage award. By affirming the verdict against the Petitioners, based upon a cause of action never before recognized by any other jurisdiction under similar facts, the Petitioners had no opportunity either to conform their conduct to these newly found duties or to explain how their actions did conform. The Petitioners respectfully submit that affirming the punitive damages against them under these facts violates their Fourteenth Amendment right to due process and violates Article I, Section 10 of the United States Constitution, prohibiting the imposition of *ex post facto* laws.

This Court has held in several cases that the Due Process Clause of the United States Constitution may be implicated where punitive damages are imposed on a tortfeasor. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454, 113 S.Ct. 2711, 2718, 125 L.Ed.2d 366, ___ (1993); *Pacific Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). From these decisions, this Court has developed certain guidelines that must be followed by appellate courts in evaluating whether the punitive damages awarded in any given case are constitutional under the facts.

One factor not addressed by the West Virginia Supreme Court is whether the punitive damages awarded were excessive, based upon the conduct and the financial position of the Petitioners. In *BMW*, 517 U.S. at ___, 116 S.Ct. at 1601, 134 L.Ed.2d at ___, this Court noted, "That conduct sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages, does not establish the high degree of culpability that warrants a substantial punitive damages award."

In this case, the Petitioners admit that the jury was not presented with evidence of their net worths, but the trial court had that information. The trial court should have examined the punitive damages awarded and compared them to the net worth of the Petitioners. This analysis is essential to determine whether the amount of punitive damages awarded is grossly excessive. *TXO*, 509 U.S. at 454, 113 S.Ct. at 2718, 125 L.Ed.2d at ___.

Based upon the figures in the record, which were presented post-trial, the punitive damages awarded against Anne ($250,000) were more than thirteen times her annual salary, Brian ($500,000) were more than five times his annual salary, and Eleanor and Thomas ($100,000) were a significant

percentage of their net worth, particularly since they are retired. With respect to Leavitt, the punitive damages awarded ($5,000,000) were more than five times his estimated net worth and more than fourteen hundred times the "profit" he made in this case.

The punitive damages awarded in this case crossed the line between merely punishing the Petitioners to financially destroying them. This Court has never held that punitive damages constitutionally can be used to eliminate all of a defendant tortfeasor's assets.

Furthermore, the amount of damages awarded far exceeds any alleged wrongdoing committed by the Petitioners. The Petitioners engaged in no illegal activity, Leavitt and Anne complied with California law with respect to the placement of the baby, and the Petitioners did not lie in any of their depositions when pertinent information was requested by Kessel. Thus, under the foregoing case law, the punitive damages awarded against the Petitioners are grossly excessive and violative of their due process rights under the Fourteenth Amendment.

The West Virginia Supreme Court misapplied the holding of this Court in *BMW*. The West Virginia Supreme Court correctly notes the Petitioners argued that since their actions were in conformity with California law, they could not be punished for acts that were legal in California. App. at 206a. Although the West Virginia Supreme Court does not challenge the Petitioners' assertion that the placement complied with California law, it further concludes, "The defendants' fraudulent concealment of information regarding Baby Boy Conaty's whereabouts, in response to John's requests for such information, directly contravened the law of California providing a cause of action for `intentional concealment of a material fact'. *See Stevens v. Superior Court*, 180 Cal. App. 3d 605, 608-09, 225 Cal. Rptr. 624, 626 (1986)(citations

omitted)." App. at 207a. This holding by the Court directly conflicted with the instructions to the jury regarding the Petitioners' lack of a duty to inform Kessel about the whereabouts of the baby.[12] Furthermore, this holding ignores the lack of any evidence in the record where any of the Petitioners withheld any information from Kessel in response to a request from him. Nevertheless, based upon that conclusion, the West Virginia Supreme Court held that the principles established in *BMW* were not violated.

The *Stevens* decision involved a case where the plaintiff sued a hospital for concealing the fact that some of its doctors were not licensed to practice medicine in California. In analyzing this fraudulent concealment claim, the California Court of Appeal specifically noted that one of the essential elements of this claim is that the defendant "must have been under a **duty to disclose** the fact to the plaintiff." (Emphasis added). 180 Cal. App. 3d at 609, 225 Cal. Rptr. at 626. Since the West Virginia Supreme Court in the present case has created a fraudulent concealment cause of action, without an underlying duty to disclose, the *Stevens* decision does not resolve the *BMW* issue regarding whether the Petitioners' conduct was in conformity with California law.

What the West Virginia Supreme Court in the present case has done is to create a tort out of legal conduct. There was nothing illegal or improper with Leavitt, as an experienced adoption lawyer, advising Anne how to place her baby for adoption, without providing notice to Kessel. Leavitt's advice was consistent with California law, which fact has not been disputed by any court. Based upon that undisputed conclusion, the imposition of punitive damages violates the following principle discussed in *BMW*, 517 U.S. at , 116 S.Ct. at 1597-98, 134 L.Ed.2d at ___:

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[12]*See* note 2, *infra*.

> We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States. ...Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.

Consistent with this holding in *BMW*, the West Virginia Supreme Court cannot constitutionally create a tort in West Virginia for conduct that was legal in California. Thus, the imposition of punitive damages under these facts violated the Petitioners' rights under the Due Process Clause.

Finally, Article I, Section 10 of the United States Constitution provides, in relevant part, "No State shall...pass any...ex post facto law...." This Court has recognized that punitive damages share "key characteristics of criminal sanctions" and that "Retroactive imposition of punitive damages would raise a serious constitutional question." *Landgraf v. USI Film Products*, 511 U.S. 244, 281, 114 S.Ct. 1483, 1505, 128 L.Ed.2d 229, ___ (1994). Furthermore, in *BMW*, 517 U.S. at ___, 116 S.Ct. at 1598, 134 L.Ed.2d at ___, this Court noted, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose."

While this Court in *Landgraf* recognized the fact that the statutory imposition of punitive damages for conduct that occurred prior to the enactment of the statute does raise an *ex post facto* problem, the issue did not have to be addressed due to the particular facts presented. However, in *Landgraf*, this

Court held that a compensatory damages statute added to the Civil Rights Act did not apply to conduct that occurred prior to the enactment of that statute.

As applied to the present case, the West Virginia Supreme Court concedes that no court in the country has ever recognized a cause of action under these facts prior to this decision. The Petitioners had no way of knowing back in 1991 that their legal actions and honest answers given in depositions might expose them to millions of dollars in damages. Thus, the Petitioners could not conform their conduct to meet these new duties that were recognized some seven years later.

By recognizing these new causes of action and affirming the verdict against the Petitioners, without reversing and remanding for a new trial based upon this new law, the West Virginia Supreme Court has imposed an *ex post facto* law on the Petitioners. Such imposition clearly is in violation of Article I, Section 10 and the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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December 8, 1998.